

June 25, 2021

**REF: Concerned Citizens of St. John the Baptist Parish  
MC-421-21  
United States**

Dear Applicants:


I am pleased to address you on behalf of the Inter-American Commission on Human Rights (IACHR) with regard to the request for information on the situation of the Concerned Citizens of St. John the Baptist Parish in the United States.

On this occasion, I am forwarding to you the response submitted by the State in connection with the matter referred to above. I respectfully request that you provide your observations on the Government's response within a period of 10 days as of the date of transmission of the present communication. In particular:

- a. inform about the effectiveness of the measures adopted by the State that are outlined in its report;
- b. any additional information that you consider relevant regarding the risk situation of the proposed beneficiaries.

In accordance with Resolution 3/18, failure to respond to this communication will result in the discontinuation of the request for precautionary measures. For further information, you may access the Resolution at: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-3-18-en.pdf>

Sincerely,

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Marisol Blanchard  
Assistant Executive Secretary

Mr.  
Robert Taylor

Devin Lowell

Enclosure

6/25/2021-MK-5030244



United States Department of State

*United States Permanent Mission to the  
Organization of American States*

*Washington, D.C. 20520*

June 21, 2021

Tania Reneaum Panszi  
Executive Secretary  
Inter-American Commission on Human Rights  
Organization of American States  
Washington, D.C. 20006

**Re: Concerned Citizens of St. John the Baptist Parish, MC-421-21  
Response of the United States to Request for Information**

Dear Executive Secretary Panszi:

We appreciate the opportunity to provide observations on the request for precautionary measures (“Request”) forwarded to the United States in the above-referenced matter relating to the Denka Performance Elastomer Neoprene facility in LaPlace, Louisiana (“Facility”) on behalf of Concerned Citizens of St. John the Baptist Parish (“Concerned Citizens”) and Tulane Environmental Law Clinic (“TELC”) (collectively “Applicants”), which your office transmitted to the United States via a letter dated May 25, 2021.<sup>1</sup>

The United States respectfully submits that the Inter-American Commission on Human Rights (“Commission”) should refrain from requesting precautionary measures in this case because the Commission lacks the authority to require such measures. Moreover, such measures are not warranted in any event for the following reasons: (1) the Commission lacks competence because Applicants have not alleged a specific failure by the United States to live up to its commitments under the American Declaration of the Rights and Duties of Man (“American Declaration”); (2) Applicants have failed to exhaust domestic remedies; and (3) the United States, consistent with its commitment to focusing on environmental justice concerns, is undertaking various domestic legal measures relevant to this matter.

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<sup>1</sup> On June 11, 2021, the Commission transmitted to the United States a letter granting an extension of 10 days from that date to present its observations.

## *Lack of Competence*

The Commission should decline the precautionary measures request here because the Commission lacks competence as Applicants have not alleged a specific failure by the United States to live up to its commitments under the American Declaration.

As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).<sup>2</sup> Article 20 of the Statute of the Commission (“Statute”) sets forth the Commission’s powers that relate specifically to OAS member states that, like the United States, are not parties to the legally binding American Convention. These powers include: (1) paying particular attention to observance of certain enumerated human rights set forth in the American Declaration (i.e., the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration); (2) examining communications and make nonbinding recommendations to the State; and (3) verifying whether in such cases domestic legal procedures and remedies have been applied and exhausted.

Here, Applicants have not shown that the United States has failed to live up to its commitments under the American Declaration. In alleging that “the U.S. and Louisiana governments violate internationally recognized human rights by failing to protect against chloroprene exposure in St. John,” Applicants point to, without further explanation, Articles I and XI of the American Declaration.<sup>3</sup> These allegations appear to be based on an extraordinarily and erroneously expansive interpretation of State commitments under those articles and are unsupported by the text of those articles. Moreover, because Article XI is not one of the particular

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<sup>2</sup> The United States consistently has maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member States of the OAS. United States Courts of Appeal have held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.,* *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.,* *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member States will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member States.” *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). As the American Declaration is a non-binding instrument and does not create legal rights or impose legal duties on member States of the OAS, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration. For a further discussion of the United States position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, *available at* <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

<sup>3</sup> Request at 3.

provisions of the American Declaration over which the Commission is empowered pursuant to Article 20 of the Statute “to pay particular attention” vis-à-vis States not party to the American Convention, an allegation based on Article XI of the American Declaration falls beyond the *ratione materiae* competence of the Commission. As such, the Commission should decline the precautionary measures request.

### ***Failure to Exhaust Domestic Remedies***

The Commission should decline the precautionary measures request in this matter because Applicants have not satisfied their duty to demonstrate that they have “invoked and exhausted” domestic remedies under Article 20(c) of the Statute and Articles 25(6) and 31 of the Commission’s Rules of Procedure. The Statute requires the Commission to “verify, as a *prior condition* to the exercise of the powers granted under [Article 20(b)], whether the domestic legal procedures and remedies of each member State not a Party to the Convention have been duly applied and exhausted.”<sup>4</sup> The Commission repeatedly has emphasized that a petitioner has the duty to pursue and exhaust all available domestic remedies. Consistent with the Statute, with respect to a request for precautionary measures, Article 25(6)(a) of the Rules directs the Commission to take into account “whether the situation has been brought to the attention of the pertinent authorities or the reasons why it would not have been possible to do so.” This provision reflects the exhaustion requirement, a general principle of international law, that is also expressly incorporated in Article 31 of the Rules, which states: “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.”

As the Commission is aware, the requirement of exhaustion of domestic remedies is embedded in the international legal system as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.<sup>5</sup> A State conducting such judicial proceedings has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort may be had to an international body.<sup>6</sup> The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of

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<sup>4</sup> IACHR Statute Art. 20(c) (emphasis added) (The Commission’s powers listed at Article 20(b) are “to examine communications submitted to it and any other available information, to address the government of any member State not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it.”).

<sup>5</sup> See, e.g. *Interhandel Case* (Switzerland v. United States) [1959] I.C.J. 6, 26–27; *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania), 1939 P.C.I.J., Ser. A/B, No. 76.

<sup>6</sup> THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968) at 18–19.

human rights, because the latter reinforces or complements the domestic jurisdiction.”<sup>7</sup> The Commission has made clear repeatedly that petitioners have the duty to pursue available domestic remedies.<sup>8</sup>

Here, Applicants explicitly have acknowledged that they simultaneously filed on May 6, 2021 an administrative Petition for Emergency Action and a Petition for Rulemaking with the Environmental Protection Agency (EPA) that covers nearly identical claims to those in the request for precautionary measures.<sup>9</sup> The Petition for Rulemaking is a remedy that is available under U.S. administrative law and gives interested parties the ability to petition a federal agency to undertake a rulemaking. Federal agencies must respond to a petition for rulemaking within a reasonable time and any denial of which may be subject to judicial review.<sup>10</sup> 5 U.S.C. § 555(b); 42 U.S.C. § 7604(a).

Furthermore, multiple complaints have been filed in U.S. District Court alleging that EPA has failed to perform an act or duty under the Clean Air Act which is not discretionary with the agency with respect to regulations that apply to the Facility, and those cases have not yet been resolved. *See, e.g., Texas Env’tl Justice Advocacy Svcs., et al., v. Regan*, Civ. Action No. 1:20-cv-3733 (D. D.C.) (filed December 18, 2020); *Environmental Integrity Project et al., v. Regan*, Civ. Action No. 1:20-cv-3119 (D.D.C.) (filed October 19, 2020). In addition, multiple petitions for review in federal courts challenge a rulemaking addressing the regulation of ethylene oxide and other hazardous air pollutants (“HAP”) emissions from facilities such as the Facility. *See Huntsman Petrochemical LLC v. EPA*, No. 20-1414 and consolidated cases (D.C. Cir) (petitions for review of *National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review*, 85 Fed. Reg. 49,084 (Aug. 12, 2020).

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<sup>7</sup> Velásquez Rodríguez Case, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

<sup>8</sup> *See, e.g. Páez García v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions, ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system). The United States recognizes that the Commission has previously stated that, while “Article 25.6.a of the Rules of Procedure establishes that whether the situation has been brought to the attention of the pertinent authorities should be taken into account . . . , such actions do not bar the Commission from granting precautionary measures . . . .” *See* Christa Pike regarding the United States of America, Precautionary Measures No. MC-1080-20, Inter-Am. Comm’n H.R., Resolution No. 95/2020 ¶ 32 (Dec. 11, 2020). However, even if the Commission takes that position, here the number of relevant matters under consideration within the robust and comprehensive domestic legal system and the complexity of these issues argue strongly in favor of allowing the United States the opportunity to first address these allegations within its own domestic legal system.

<sup>9</sup> The Applicants also acknowledge that individual members of their group have filed private civil tort actions seeking similar relief that “could address chloroprene emissions from the Denka/Dupont facility.” *See, e.g., Taylor v. Denka Performance Elastomer*, 2:17-cv-7668 (E.D. La.). Those matters are still pending before the respective courts.

<sup>10</sup> The Petition for Emergency Action and the Petition for Rulemaking also appears to include a request to initiate an investigation of the Louisiana Department of Environmental Quality pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et. seq.* Title VI prohibits discrimination on the ground of race, color, or national origin, by programs or activities that receive financial assistance from federal agencies including the EPA.

The Commission, therefore, should decline to recommend precautionary measures in this case because Applicants have not demonstrated that they have exhausted domestic remedies, and the facts are to the contrary. The Commission should not permit Applicants to circumvent the U.S. domestic administrative and court systems by petitioning for precautionary measures before they have exhausted domestic remedies.

Since 2016, the United States, through its various bodies, has engaged extensively in outreach with the residents of St. John The Baptist Parish and remains attentive to the concerns raised by that community. Indeed, as EPA routinely reviews air toxics in the United States and provides a “snapshot” of outdoor air quality with respect to emissions of air toxics, it was EPA’s review of the National Air Toxics Assessment that initially brought the Facility to EPA’s attention in December 2015.

In 2016, EPA performed a Clean Air Act inspection at the Facility and identified potential violations of federal and State air quality regulations. In 2017, EPA supported LDEQ efforts to enter into a State Administrative Order on Consent (“AOC”) between LDEQ and Denka, pursuant to which Denka installed a regenerative thermal oxidizer (“RTO”) and took other emission control measures to reduce chloroprene emissions by 85% by the end of 2017.<sup>12</sup>

<sup>12</sup> The AOC is available through LDEQ's Electronic Document Management System (EDMS) at [https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fedms.deq.louisiana.gov%2Fapp%2Fdoc%](https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fedms.deq.louisiana.gov%2Fapp%2Fdoc%2F)

From 2016-2020, EPA's Office of Air and Radiation and Region 6 maintained a community air monitoring program that collected air samples at six monitoring sites in the neighborhood surrounding the Facility to assist in EPA's assessment of the long-term ambient chloroprene concentrations and to gauge the potential risks to the community from chloroprene emissions. Each monitor collected a 24-hour air canister sample at a fixed interval of days. The air samples were sent to a laboratory for analysis and determination of the concentration of chloroprene. A summary report of the community monitoring program is posted publicly on EPA's website.<sup>13</sup> The summary report notes that since the implementation of emission controls resulting from the State AOC, air sampling results have shown reduced chloroprene emissions at all monitoring locations. Average ambient chloroprene levels measured across the six community air monitors have decreased from pre-control levels.

In March 2020 and prior to the conclusion of the community air monitoring program in September 2020, EPA implemented a "Continuous Air Monitoring Program" which utilizes six "SPod" monitors located in the community. These monitors are still operational. The SPods continuously measure total volatile organic compounds ("VOCs"), which includes chloroprene, and take a 24-hour air canister sample whenever they detect a spike of the ambient VOC concentration. The SPod-collected air samples are sent to a laboratory for analysis and determination of the concentration of chloroprene. This monitoring network was designed to facilitate the investigation of chloroprene emission events at the Facility, which contributed to the elevated ambient chloroprene concentrations in the community. The monitoring results are posted to EPA's public website.<sup>14</sup>

In late 2020, EPA secured a public commitment from Denka to continue its ambient air monitoring, which Denka began in 2016 and has continued through 2021. Denka's monitoring results are shared with LDEQ and EPA. They also are publicly available through LDEQ's Electronic Document Management System.<sup>15</sup>

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<sup>13</sup> <https://www.epa.gov/la/denka-air-monitoring-data-summaries>.

<sup>14</sup> <https://www.epa.gov/la/denka-air-monitoring-data-summaries>.

<sup>15</sup> Denka's most recent Monitoring Results Package ("Package") for May 2021 is available through <https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fedms.deq.louisiana.gov%2Fapp%2Fdoc%2Fview.aspx%3Fdoc%3D12754941%26ob%3Dyes&data=04%7C01%7CLannen.Justin%40epa.gov%7C8045aaceeb76348cac26b08d934c3c3ae%7C88b378b367484867acf976aacbeca6a7%7C0%7C0%7C637598837968138004%7CUnknown%7CTWFpbGZsb3d8eyJWIjoicMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6IklhaWwiLCJXVCi6Mn0%3D%7C2000&sdata=XAgY5JUXNdcIJLCC%2FDBd6wYmw9AFFIypk%2FYK1GwNXVg%3D&amp;reserved=0>. The May 2021 Package may also be accessed by going to <https://edms.deq.louisiana.gov/app/doc/querydef.aspx> and searching for Document ID: 12754941. Denka submits monthly monitoring results to LDEQ by the 15th day of the following month.

EPA continues to communicate with Concerned Citizens, and the broader community, through written correspondence to community leaders and public meetings. All relevant publicly available documents (other than enforcement sensitive documentation) are released on EPA's LaPlace, Louisiana webpage: <https://www.epa.gov/la/laplace-st-john-baptist-parish-louisiana>.

Finally, EPA recognizes that the communities surrounding the Facility face environmental justice concerns. Over five thousand people and two public schools are within a radius of 2.4 kilometers from the Facility. The majority of this population comprises people of color and low-income. The United States is committed to protecting the health of the citizens in St. John the Baptist Parish and to continuing its ongoing work. As set forth above, in conjunction with LDEQ, EPA has characterized air quality in the communities surrounding the Facility and required chloroprene emission reductions from the Facility to the ambient air. Progress in reducing emissions from the Facility and, in turn, reducing risks for the communities has been achieved, and additional processes are underway. EPA's actions are consistent with Executive Order 14008, under which President Biden directs federal agencies to "make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities." The extraordinary measure that the Applicants are seeking from the Commission is unwarranted given the United States' ongoing efforts to address the community's concerns and reduce air pollution from the Facility.

### ***Lack of Authority***

In closing, we take this opportunity to reaffirm our longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which articulate the United States position on precautionary measures in detail.<sup>16</sup> Because the United States is not a Party to the American Convention, the Commission has only the authority "to make recommendations ... to bring about more effective observance of fundamental human rights."<sup>17</sup> As such, should the Commission adopt a precautionary measures resolution in the above-captioned matter, the United States will take it under advisement and construe it as recommendatory.

Please accept renewed assurances of my highest consideration.

Sincerely,

(Endorsed electronically)

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<sup>16</sup> See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D, available at <https://www.state.gov/documents/organization/258153.pdf>.

<sup>17</sup> Commission Statute, art. 20(b).



Bradley Freden  
Interim Permanent Representative